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IN THE

# Supreme Court of the United States

T-MOBILE USA, INC.,

*Petitioner,*

v.

BRUCE GATTON, JEWELDEAN HULL, CHRISTINA NGUYEN, CONOR VAUGHAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; AND CHRISTINA NGUYEN, ADRIANNE GRANT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its Petition, T-Mobile USA, Inc., showed that the California Court of Appeal's refusal to enforce the terms of the parties' agreement to arbitrate individually conflicts with decisions of a number of federal circuit courts as well as this Court's application of Section 2 of the Federal Arbitration Act ("FAA"). Pet. 2-5. Petitioner further showed that this case presents a recurring issue of national importance that affects contracts benefiting countless consumers and businesses: whether state-law unconscionability principles may be employed to discriminate against and prevent the enforcement of agreements to arbitrate individually in cases involving claims by a consumer. *Id.* at 2-5, 10-11.

As T-Mobile previously noted, this case presents the same question as in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). The reply brief in *Laster* is being filed at the same time as this brief. Efficiency dictates that the petitions in both cases be considered together, and respondents have offered no legitimate reason why that course should not be followed. The petition for certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

### A. The State Court's Decision Is Final And Reviewable, And Presents An Appropriate And Viable Vehicle For Review.

Respondents lead with the argument that the decision of the California Court of Appeal is not reviewable, lacks finality, and presents a poor vehicle for resolving this conflict. Opp. 2-6. These claims are baseless.

The decisions of lower state courts are final and reviewable when the state's highest court denies discretionary review. *Perry* v. *Thomas*, 482 U.S. 483, 489 & n.7 (1987) (reviewing FAA decision arising from California Court of Appeal where state supreme court denied review); *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008) (same). Here, the decision of the California Court of Appeal was issued in reliance on *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), and the state supreme court subsequently denied review. Pet. App. 61a. The court's refusal to compel arbitration likewise is a "final judgment" for purposes of this Court's jurisdiction. *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984). The decision below is both final and ripe for review.

Respondents' suggestion that the FAA does not apply in state courts is equally unfounded. Opp. 3. This Court has repeatedly reviewed state court decisions involving the FAA, and has expressly ruled that the FAA applies in state as well as federal courts. *Southland Corp.*, 465 U.S. at 15-16; see *also Preston*, 128 S. Ct. at 983; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468 (1989); *Perry*, 482 U.S. at 490-92.

Respondents' claim that petitioner is somehow "distrust[ful]" of arbitration is similarly misguided. Opp. 10. To the contrary, the severance provision in the arbitration agreement highlights the nature and importance of the underlying dispute. Here, the parties agreed to arbitrate individually any disputes that might arise, rather than doing so on a class-wide basis. Pet. App. 62a-64a. As this Court has explained, Congress enacted the FAA to ensure the enforcement of the procedures chosen by parties to resolve their disputes. *Volt Info. Scis., Inc.*, 489 U.S.

at 479. Thus, a fundamental benefit of arbitration is that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Yet, the state court refused to enforce an essential term of the parties' agreement to arbitrate – their agreement to arbitrate on an individual basis – on grounds that violate the FAA. Pet. 9-10; Pet. for Certiorari at 25-29, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). As such, the inclusion of a severance provision underscores the importance attached to the parties' decision to resolve disputes individually, rather than through class-wide arbitration. T-Mobile does not challenge the state courts' enforcement of the severance provision, see Pet. App. 58a, but instead attacks the antecedent determination that individual arbitration is unconscionable and the resulting refusal to enforce the parties' agreement in accordance with its terms. This case squarely presents that issue, which, as shown below, is one of surpassing importance and implicates a substantial conflict among the federal courts of appeals.

### B. The Decision Below Conflicts With Rulings By Numerous Other Courts.

Respondents also contend that the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), does not create a conflict among the circuits "worthy of this Court's review." Opp. 12. This is simply incorrect, as discussed in greater detail in the petition for certiorari filed in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and in the

reply brief that is being filed in *Laster* concurrently with this brief.

### C. The Decision Below, Like That In *Laster*, Violates The FAA.

Respondents next assert that the decision below, as well as that in *Laster*, "present no threat" to the FAA's policy "favoring enforcement of arbitration agreements." Opp. 6. That too is incorrect.

Respondents' contention that California is not "generally hostile to arbitration" and that the decision below favors arbitration, Opp. 6-7, is belied by the fact that the decision below, and the decisions on which it depends, refused to enforce the parties' agreement according to the parties' own terms. Pet. App. 24a.[1] As the California Supreme Court acknowledged in *Discover Bank*, class-wide arbitration requires a "greater degree of judicial involvement" than individual arbitration, and, in fact, is better characterized as a "*hybrid procedure* of classwide arbitration." *Discover Bank*, 113 P.3d at 1106 (internal quotation marks omitted) (emphasis added).

Under that "hybrid procedure," a "'court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement.'"

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[1] *See, e.g., Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000) (declaring that, instead of presenting an alternative to litigation, arbitration is "an inferior forum" that advantages one of the parties where the court perceived flaws in the agreement).

*Id.* (quoting *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982)). Nevertheless, such "judicial intrusion" into private arbitration is appropriate, the court concluded, given the "important role of class action remedies in California law." *Id.* *See also* *Muhammad* v. *County Bank of Rehoboth Beach*, 912 A.2d 88, 102 (N.J. 2006) (noting that "for a specific procedure to be considered 'class arbitration,' we presume that the essential elements of modern class actions would be present."), *cert. denied*, 127 S.Ct. 2032 (2007); *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 362 (S.C. 2002) ("[P]rotection of the due process rights of absent class members is an essential component in all class actions, and one which may necessitate particular attention in class-wide arbitrations . . . ."), *vacated*, 539 U.S. 444 (2003).

Respondents candidly admit that class-wide arbitration is "undoubtedly longer and more involved" than arbitration on an individual basis. Opp. 11. But the parties did not agree to adopt "hybrid procedures" requiring substantial judicial intervention, and the refusal by the court below to compel arbitration clearly undermines the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms," including "the rules under which that arbitration will be conducted." *Volt Info. Scis.*, 489 U.S. at 479. Although a party who agrees to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), judicial intrusiveness in "hybrid" class arbitration proceedings is so significant that even the California Supreme Court acknowledged that "'[a] good deal of care, and ingenuity, would be required to

avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay.'" *Discover Bank*, 113 P.3d at 1106 (quoting *Keating*, 645 P.2d at 1209).

The substantial judicial intrusion mandated by the court below undermines the FAA's policy of promoting arbitration as a viable alternative to litigation. Indeed, the parties to this agreement preferred to abandon the arbitral forum altogether rather than risk the uncertain procedures and costs of judicially-mandated class arbitration. Far from affirming and supporting voluntary alternative dispute resolution agreements, the specific modifications necessary to create California's "hybrid" class procedures represent the very sort of discrimination that the FAA was intended to prohibit. See *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270-73 (1995).

### D. The State Law Applied Here Discriminates Against Arbitration And Is Preempted.

Finally, respondents argue, on the merits, that the refusal to compel individual arbitration in this case is specifically authorized by § 2 of the FAA. Opp. 15-20. As shown above, respondents' arguments are the very issues that have generated conflicts among the lower courts and that warrant resolution by this Court. In all events, those arguments should be rejected on the merits.

The suggestion that individual arbitration would "exculpate" petitioner from liability simply ignores contrary decisions that have held that individual arbitration allows consumers to effectively vindicate

their statutory rights. Here, respondents do not, and cannot, claim that they are individually unable to vindicate their rights. Indeed, "the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). Holding arbitration provisions unconscionable because they require individual arbitration is tantamount to "hold[ing] that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Gay*, 511 F.3d at 395.

Finally, if there were uncertainty on this issue, "[t]he [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

Respectfully submitted,

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